

## **Other Historic Preservation Laws**

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### **1. The National Environmental Policy Act (NEPA)**

The National Environmental Policy Act (NEPA) is a procedural law that establishes a national policy and planning process for addressing effects, as the result of federal actions, on the environment. Congress passed NEPA as the national policy for a “better human environment.” The “human environment” includes physical, natural, social and cultural elements of the environment. Important historic and cultural aspects of our natural heritage are explicitly included as elements of our natural environment that merit preservation in accordance with provisions of NEPA. The Act also directs Federal agencies having special expertise (e.g., National Park Service and the Advisory Council on Historic Preservation) to be part of the environmental impact statement process.

To accomplish this policy, NEPA requires that, before the Federal Government can fund or implement an action, agency decision-makers must study the impacts that the proposed action and alternatives will have on the environment, and make that information available to the public. As you learned in the Introductory Course on FEMA’s Environmental and Historic Preservation Compliance Process, FEMA’s regulations that tailor NEPA to FEMA’s programs are located in 44 CFR Part 10.

There are four possible outcomes under NEPA:

1. Statutory Exclusion, called a STATEX
2. Categorical Exclusion, called a CATEX
3. Environmental Assessments, called EAs, which may result in a Finding of No Significant Impact (FONSI) or
4. Environmental Impact Statements(s)

Over 94% of FEMA projects are Statexes, about 5% are Catexes, and the rest are EAs.

In coordinating historic preservation compliance with NEPA, it is important to remember that Statexed and Catexed projects are not excluded from compliance with NHPA.

Sections of 36 CFR Part 800 (800.8(a)) specifically address coordination between NEPA and Section 106. The regulation encourages early coordination and directs that consulting parties should be prepared to consult early in the NEPA process, when purpose and need are being defined and a wide range of alternatives is open. For FEMA, the planning stage of NEPA is more difficult for response and recovery projects, for which applicants are submitting projects to repair disaster damage. Mitigation programs, however, involve more planning and are therefore much more conducive to such early coordination.

In addition, the regulation encourages agencies to include “appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of

any adverse effects” in EAs, FONSIIs, EISs and Records of Decision (RODs). For NEPA review of a project in which historic properties are adversely affected, FEMA ensures that a separate Memorandum of Agreement is complete and becomes part of the NEPA documentation (FONSI or ROD).

Although 36 CFR Part 800 provides for the use of the NEPA process and documents to comply with Section 106 in lieu of the procedures set forth in 800.3 through 800.6, FEMA has made the decision to not follow this path at the present time. FEMA does, however, closely coordinate the public participation elements of both NEPA and Section 106.

## **2. Archeological and Historic Preservation Act of 1974 (AHPA)**

The Archeological and Historic Preservation Act is intended to preserve historical and archeological data that may be threatened by dam construction or other alterations of the terrain.

The Act requires FEMA and other Federal agencies to notify the Secretary of Interior of any construction or license for construction of a dam or any Federal project that may destroy significant scientific/archeological data. The Secretary may survey the area to recover and preserve data, which she determines to be in the public interest, and will consult with interested parties to determine ownership and the most appropriate repository for any relics recovered.

FEMA staff should understand that notifying the Interior Secretary, as required by AHPA, does not constitute compliance with Section 106 of the National Historic Preservation Act.

## **3. Archaeological Resources Protection Act of 1979 (ARPA)**

ARPA prohibits unauthorized excavation on Federal and Indian lands. The law is intended to secure archeological resources and to foster cooperation between governmental authorities and the archeological community with regard to archeological resources and data.

Anyone may apply for a permit to excavate or remove archeological resources located on Federal or Indian lands. A permit may be issued if the:

- applicant is qualified
- activity furthers archeological knowledge in the public interest
- resources remain property of the U.S. and
- activity is consistent with management of public lands.

If a permit may cause harm or destruction of any religious or cultural site, the Federal land manager shall, before issuing a permit, notify any Indian tribe that may consider the site to have religious or cultural significance. Indian tribes or tribal members do not require a permit for excavation or removal of any archeological resource on Indian lands, except in the absence of tribal law regulating such removal or excavation.

Unlike NHPA, ARPA provides for both civil and criminal penalties for failure to comply with the Act.

#### **4. Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)**

NAGPRA requires FEMA and other Federal agencies, as well as museums receiving federal funds, to inventory their holdings of Native American cultural items, including human remains and objects associated with funerals or burials, and develop written summaries for unassociated funerary objects, sacred objects, and objects of cultural patrimony that are in the collections they own or control. Agencies must notify Indian Tribes or Native Hawaiian organizations that appear to be culturally affiliated with the items in their holdings, and offer them the opportunity to claim the remains and items.

The second principal intention of the law is the protection, on Federal and Tribal lands, of Native American graves and other cultural items still located within archaeological sites. On Federal and Tribal lands, archaeological investigations for planning or research purposes, or other land-modifying activities that inadvertently discover cultural items require FEMA or the Tribe involved to consult with affiliated or potentially affiliated Native Americans concerning the treatment and disposition of these items.

When intentional excavation and removal of Native American human remains and cultural items from Federal and Tribal lands must occur, this activity may proceed only with a permit issued pursuant to the Archaeological Resources Protection Act after consulting with the appropriate Tribe. If an inadvertent discovery is made of Native American remains or objects in connection with an activity on Federal or Tribal lands, the activity must cease in the area of discovery, a reasonable effort must be made to protect the items discovered before resuming activity, and the appropriate Federal agency or Tribal authority must be notified

NAGPRA requirements may overlay Section 106 requirements of the National Historic Preservation Act (NHPA) when undertakings occur on Federal or Tribal lands.

#### **5. American Indian Religious Freedom Act of 1978 (AIRFA)**

AIRFA preserves and protects, for American Indians, their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiians. The intent of AIRFA has been interpreted as ensuring that Native Americans obtain First Amendment protection, but not to grant them rights in excess of the First Amendment.

Specifically, AIRFA preserves and protects for American Indians:

- access to sites
- use and possession of sacred objects
- freedom to worship through ceremonials and traditional sites.

If a place of religious importance to American Indians may be affected by an undertaking, AIRFA promotes consultation with Indian religious practitioners, which may be coordinated with Section 106 consultation.

Amendments to NHPA in 1992 strengthened its interface with AIRFA by clarifying that:

- properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.
- in carrying out its responsibilities under Section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to the protected properties.

**6. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (1994)**

Executive Order 12898 focuses Federal attention on the environmental and human health conditions in minority and low-income communities with the goal of achieving environmental justice.

Environmental justice means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

The Order makes achievement of environmental justice part of the mission of Federal agencies by identifying and addressing disproportionately high and adverse human health or environmental effects of Federal programs, policies and activities on minority populations and low-income populations.

**In addition, this Order requires federal agencies to provide minority and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment.**

**7. Executive Order 13007: Indian Sacred Sites (1996)**

Executive Order 13007, signed by President Clinton on May 24, 1996, requires Federal land-managing agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sacred sites. It also requires agencies to develop procedures for reasonable notification of proposed actions or land management policies that may restrict access to or ceremonial use of, or adversely effect, sacred sites.

Sacred sites are defined in the executive order as “any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.” There is no review of such determinations by Federal agencies.

In 2001, the Advisory Council on Historic Preservation (ACHP) provided additional guidance to Federal agencies regarding the relationship between E.O. 13007 and Section 106:

It is important to note that a sacred site may not meet the National Register criteria for a historic property and that, conversely, a historic property may not meet the criteria for a sacred site. However, in those instances where an undertaking may affect a historic property that is also considered by an Indian tribe to be a sacred site, the Federal agency should, in the course of the Section 106 review process, consider accommodation of access to and ceremonial use of the property and avoidance of adverse physical effects in accordance with E.O. 13007.

To the extent that the requirements of the executive order and the Council's regulations are similar, Federal agencies can use the Section 106 review process to ensure that the requirements of E.O. 13007 are fulfilled. For example, E.O. 13007 requires that agencies contact Indian tribes regarding effects and the Section 106 regulations require consultation with Indian tribes to identify and resolve adverse effects to historic properties.

Consultation regarding the identification and evaluation of historic properties of religious and cultural significance to an Indian tribe could include identification of those properties that are also sacred sites. Similarly, consultation to address adverse effects to such historic properties/sacred sites could include discussions regarding access and ceremonial use.

While a Federal agency is not required to integrate the requirements of the executive order in the Section 106 review process, it may be beneficial for both the agency and the tribe to do so. Not only would it be more efficient to integrate the requirements, but it might also ensure that all issues and values are given appropriate and timely consideration.